

1 J. TONY SERRA, SBN 32639
GREGORY M. BENTLEY, SBN 275923
2 CURTIS L. BRIGGS, SBN 284190
506 Broadway
3 San Francisco, CA 94133
Telephone: 415/986-5591
4 Fax: 415/421-1331
jts@pier5law.com
5 bentley.greg@gmail.com
curt.briggs@gmail.com

6 Attorneys for Defendant
7 KWOK CHEUNG CHOW

8 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
9 SAN FRANCISCO DIVISION

10 No. CR 14-0196 CRB

11 UNITED STATES OF AMERICA,

DEFENSE STATEMENT RE:
DISCOVERY

12 Plaintiff,

13 vs.

14 KWOK CHEUNG CHOW,

15 Defendant.

16 _____/

17
18 On behalf of Raymond Chow, and co-defendants similarly
19 situated, the following is intended to notify the court as to
20 discovery management and distribution issues, and to advise the
21 court of foreseeable delays in defense preparation.
22 Specifically, the court should be aware that there is a lack of
23 any discernable organizational structure in the discovery files
24 as delivered by the Government to defense counsel. This
25 substantially impairs the ability to prepare defenses, conduct
26 investigation, and evaluate the merits of pretrial motions. This
27 will continue to cause unnecessary delay unless remedial
28 measures are taken. In addition, counsel hereby notifies the

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1 court of a preliminary indication that the FBI may be concealing
2 certain evidence from the United States Attorney. This is
3 evidenced by the lack of notice to the Government of apparent
4 drone surveillance on persons in Northern California in the
5 course of this investigation, without any disclosure whatsoever
6 of supporting documentation (i.e. 302s). Finally, discovery
7 distribution has not been entirely consistent with the Statement
8 Re: Discovery submitted by the Government and this serves to
9 supplement and clarify the record on behalf of defense.

10

- 11 1. A lack of organization in the millions of files turned over
12 in discovery substantially impairs both the ability to
13 prepare defenses and evaluate the merit of potential
pretrial motions.

14

15 As this court is already aware, there is an enormous amount
16 of discovery as it pertains to 29 co-defendants and multiple
17 operations and investigations spanning back potentially a
18 decade. The court was proactive in assigning a discovery
19 coordinator to assist defendants in the organization and
20 indexing of data which could potentially remedy this issue to a
21 large extent.¹ However, due to distribution of discovery that
22 took place later than expected, the discovery coordinator
23 estimates indexing and organizing to be completed in December
24 2014.

25

26

27 ¹Although with a large amount of data it is an invitation for
28 non-disclosure to task the opposing party with sole
responsibility to inventory discovery since the entity most
knowledgeable is the proponent.

1 One probably cannot visualize the difficulty of finding
 2 individual files with this volume unless tasked with it. It is
 3 exponentially more work to find specific files than to transfer
 4 them in bulk to someone else. To date, the total number of
 5 computer files disclosed from the Government in this case
 6 exceeds 7 million.² There are over 100,000 folders and
 7 subfolders.³ The scanned documents consist of 46 folders
 8 containing 1,758 individual files.⁴ Each of these files consist
 9 of FBI 302s, affidavits, line sheets, phone intercepts
 10 summaries, body wires summaries, and more⁵. Some document files
 11 are less than a page while others are hundreds of pages. There
 12 is little uniformity as to the file names and the system
 13 utilized by the Government in organizing files is not readily
 14 apparent. Perhaps the greatest and most time consuming
 15 challenge arises with respect to audio files where they must be
 16 located and listened to, and then defense staff sometimes has to
 17 identify parties by sound of voice with little reference point
 18 or guidance for whose voice is actually heard. Perhaps even
 19 identify a party whose voice he or she has never heard before.

20 ²Confirmed through Microsoft Windows Explorer, hover mouse over
 21 file, right click, select properties, and it will auto-count.
 22 Many files are not discovery files but they still need to be
 sifted through to determine they are not relevant.

23 ³Same as footnote 1.

24 ⁴Same as footnote 1.

25 ⁵On advise of the discovery coordinator defense purchased a
 26 commercial indexing program which has tremendously assisted in
 27 key word searches throughout the discovery universe. However, it
 does not assist with video or audio review, it occupies a
 28 majority of computer resources while activated, and there is a
 steep learning curve.

1 In early August 2014, the Government did provide an index
2 of broad categories of discovery documents and audio video files
3 grouped into specific Bates ranges. This was extremely helpful
4 and appreciated. However, the Government only created 1,123
5 separate categories which did not provide sufficient indexing
6 for the millions of files. For example, one of the 1,123
7 categories on their index identified "Bates 800001" as
8 "Recorded phone calls and conversations, and video surveillance
9 of meetings" but there is no reference as to what time frames,
10 what part of this investigation, and/or what other files these
11 recordings pertain to.

12 Similarly lacking is any indication of which of the
13 multiple operations the file pertains to, which defendants are
14 involved, or any other identifying information. For example,
15 there are 3,165 total files of recordings in Bates 800001 alone,
16 so if defense counsel is looking for a recorded phone call we
17 are forced to manually rummage through more than 3,000 audio
18 files until we find the appropriate recording based on what we
19 hear. The problem is exponential in the event a recording
20 cannot be found since that necessitates an even broader search
21 and double checking. It is not uncommon to spend hours
22 confirming the non-existence of a file before contacting the
23 Government to find out it was inadvertently withheld.

24 Until the discovery is adequately organized, either through
25 disclosure of the Government's internal organization structure
26 or by the discovery coordinator's completion of an index, the
27 defendants run the risk of falling below Constitutional minimum

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1 guarantees through excessive and unnecessary delay to say the
2 least.

3
4 2. Preliminary evidence suggests that the FBI is withholding
5 discovery from the US Attorneys in this case.

6 Especially recently, the US Attorneys on this case seem to
7 have been working diligently to communicate quickly and
8 effectuate the exchange of discovery as rapidly as possible and
9 it is greatly appreciated. As communicated multiple times, the
10 AUSA's intend to disclose more than what they feel is required
11 to assist in defense preparation. There are indicators,
12 however, that the FBI is withholding evidence from the US
13 Attorney's Office and this statement serves only to bring the
14 issue to the court's attention as this will likely be the
15 subject of future motions.

16 Here, one unmarked orphan file in the 7 million plus total
17 files disclosed was footage of what appears to be a drone⁶, or
18 unmanned aerial vehicle, surveilling a local family which was
19 under investigation and eventually arrested in events related to
20 this case. The drone surveillance video accompanied discovery

21 _____
22 ⁶Counsel has no experience with drones or UAVs. The opinion
23 that it is drone footage is based on the fact it was circling
24 approximately 650' above the ground. It circled the target home
25 for more than an hour of which its altitude never appeared to
26 deviate significantly. It was hovering in the air above a
27 residential neighborhood above a cul-de-sac with little traffic
other than target vehicles, during broad daylight, did not seem
to alert people below, had camera capabilities to zoom in
extremely close on front porches, license plates, on various
objects on the ground, and had a GPS target location specified
on the screen. No voices were heard and no human involvement was
observed at any point. The footage is from June 2012.

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1 but was not Bates-stamped as required by the Protective Order.
2 Despite the fact that the FBI documented even the most mundane
3 activity against this particular defendant and his family over
4 the course of a year, including installation and removal of a
5 closed-circuit video device across the street from a residence,
6 there appears to be no mention of drone or aerial surveillance
7 anywhere in any document provided thus far. The Government
8 makes no mention of having disclosed, or intending to disclose,
9 footage of drone surveillance or related documentation in its
10 Statement of Discovery. One inference is that the AUSA's are
11 aware of the drone surveillance and that they disclosed the
12 footage accordingly and that failure to provide an accompanying
13 302 was an oversight. Another inference is that the FBI
14 attempted to delete all drone footage files prior to
15 transferring the discovery to the prosecution team but neglected
16 to delete the last video in a month long series. Something does
17 not add up and one potential explanation is that the FBI is
18 withholding information from the US Attorney.

19 With no actual court supervision over the universe of the
20 FBI discovery as a whole, defense counsel is forced to
21 hypothesize as to why various things have not been disclosed,
22 and in some instances we must speculate as to the general
23 existence of such in the first place. There is reason to
24 believe far more drone footage exists than what was disclosed
25 and the potential that many, if not all, persons investigated
26 were surveilled through drones is a probability.

27 Curiously, the drone footage was not Bates-numbered so it
28

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1 is not even protected material which makes it more likely that
2 the AUSA's were not aware of the footage as they would have
3 likely wanted it to fall within the protective order. Drone
4 surveillance is pertinent to many defendants because aerial
5 surveillance happened during a time in this investigation where
6 the FBI was either applying for or attempting to maintain the
7 court's permission for electronic surveillance on one or more of
8 the defendants' telephones or vehicles. It does not appear to be
9 addressed by the Government applicants when demonstrating
10 requisite necessity at any time. AUSA's were always involved in
11 the application process and it is unlikely they would not
12 disclose a relevant fact such as the ability to conduct unmanned
13 aerial surveillance.

14 Another indication that the FBI is withholding information
15 from the US Attorney is evident in what is currently understood
16 to be the first wiretap application in this case, applied for in
17 December of 2011. The agent's affidavit states in part:

18
19 **Multiple court orders have been issued authorizing**
20 **the installation and use of pen register and trap**
21 **and trace devices on telephones used by the Target**
22 **Subjects and Interceptees.** Agents have also
23 obtained toll records for these telephones.
24 Analysis of these records and data show several
25 communications between CHOW and his associates
26 confirming that many of the Target Subjects and
27 Interceptees appear to communicate with each other
28 over the telephones. Additionally **cell site data**
from pen register trap/trace orders have allowed
agents to approximate the location of subjects of
this investigation therefore providing agents a
general idea of the physical whereabouts of the

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1 **Target Subjects and Intercept...**⁷⁸[emphasis added]

2 This raises concerns for many reasons. First, despite an
3 assurance from the prosecution to disclose such, no discovery
4 exists reflecting court authorization to monitor the subjects
5 and interceptees which indicates illegal surveillance was
6 conducted in this investigation as evidenced in part by the FBI
7 agent's declaration under penalty of perjury that "multiple
8 court orders" had been obtained. Second, if an order did in
9 fact exist, it has not been provided to defense counsel in
10 discovery despite assurances all such items would be provided;
11 thus, this would raise a concern about accountability to ensure
12 disclosure as promised. Third, when defense counsel inquired
13 with the US Attorney on the whereabouts of the court orders
14 referenced by both FBI Agents Pascua and Vanderporten in the
15 January and April 2012 affidavits, the Government had no
16 explanation and inquired with the case agents. This is
17 concerning because it raises an issue Mr. Chow is adamant about.
18 Specifically, he believes his phone communications have been
19 monitored and that the FBI is withholding recordings from
20 discovery because they were exculpatory. Because defense is
21 without confirmation that the information exists or not it would
22 be difficult to compel. The potential for an undisclosed
23 interception in the context of this investigation is starting to
24 look like a reality based on what has been observed so far.

26 ⁷Bates 400001, Page 72, Paragraph 286.

27 ⁸Bates 400126, page 63, Paragraph 149.

1 If the FBI's theory of criminality about Mr. Chow is to be
2 believed at all, the lack of a wiretap or audio recording device
3 on Chow is beyond improbable. With Chow's past reputation and
4 criminal record carrying the weight of wiretap applications for
5 people whom he hardly met, who were by the FBI's own admission
6 from an unrelated investigation, an application of any type
7 would have been approved to monitor Chow's cell phone or the
8 Chinese Free Mason's phone line would have been a slam dunk. Of
9 all things, the FBI's narrative here illustrates the need for
10 critical oversight and unencumbered Due Process regarding
11 discovery. This is especially so with what the FBI claims does
12 not exist.

13 According to the FBI they were surveilling Chow since 2006,
14 they supposedly "infiltrated" his "criminal organization" the
15 Chinese Freemasons, yet the FBI found not one crime from 2006 to
16 2010; until UCE 4599 worked tirelessly to convince a young co-
17 defendant to launder FBI money in partnership with the UCE who
18 was supposed to have been posing as a La Cosa Nostra crime boss.
19 The agent's mafia front was apparently supposed to be obvious to
20 everyone despite the uncontested fact that for years he held
21 himself out as an investment manager, private wealth manager,
22 future restaurateurs, who was passionate about fine food and
23 wine, and interested in investing in a high end restaurant in
24 San Francisco. Furthermore, the agent went by a protestant
25 name, spoke like a well educated person, wore traditional
26 conservative business attire, and the agents posing as his
27 business partners and close friends were not acting like

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1 mafiosos, but instead one was an African-American real estate
2 developer and the other a Chinese-American import-exporter of
3 goods.

4 Beyond that, what has been turned over in discovery is
5 shocking to the extent the agents either misrepresented facts
6 and even recorded conversations, or attested under penalty of
7 perjury to statements which they, in fact, did not have
8 knowledge. Attorneys for both sides in this case should look at
9 the FBI's narrative with healthy skepticism when evaluating
10 discovery, especially in the context of what is stated by the
11 FBI not to exist. The lack of credibility of primary FBI agents
12 in this case has been, and will to a greater extent in the
13 future, raised with sufficient supporting evidence to, at a
14 minimum, warrant the court providing recommendations to assist
15 in monitoring the universe of discovery.

16 Potentially this Court would entertain the idea of having
17 the Government designate a specific supervisory FBI agent who
18 would be present at pretrial conferences and motion hearings as
19 a resource and to ensure accountability throughout the
20 prosecution of all defendants in this case. Furthermore,
21 defense requests some type of a system or log identifying in
22 general terms what discovery is to be expected, when it should
23 be expected, and what is entailed so that we can budget time and
24 resources proactively to provide swift adjudication.

25

26 3. The Government's Statement of Discovery requires
27 clarification.

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1 The Statement of Discovery filed by the United States has
 2 the potential of being interpreted in a way to suggest that
 3 discovery exchange has been timely and without obstacle.
 4 Ironically, prior to reading the Statement of Discovery, Chow's
 5 defense team was fairly satisfied with the progress in discovery
 6 with a few exceptions which will necessitate litigation, but
 7 understandably so. However, a comparison of the Government's
 8 position in informal discovery negotiations from August to
 9 present, and their Statement of Discovery recently submitted,
 10 raises the necessity to clarify the record for the court. This
 11 is not a complaint but only serves to make the court aware there
 12 is an additional perspective which may be relevant in future
 13 scheduling and motions to compel.

14 Below are specific categories mentioned in the Government's
 15 statement (in bold), but which should be clarified:

16
 17 **Photographs:** No photographs whatsoever have been turned
 18 over regarding Chow, the CKT, Alicia Lo, the
 19 investigation and search subsequent arrest, or any
 20 other photo of Chow or the CKT related to this
 21 investigation. No photographs have been turned over
 22 that are not related to co-defendant Mei that defense
 23 counsel is aware. The Government has promised to turn
 24 them over but has yet to identify the nature of the
 25 photos, estimated quantity, or when they should be
 26 expected.

27 **Jail calls:** Chow's counsel has received no jail call
 28 recordings although they have been requested through
 incorporation of informal discovery requests on at
 least two occasions.

29 **A-files for non-citizen defendants:** Government has
 30 agreed to provide Chow's A-file but has not provided
 31 the file nor have they provided any date in which it
 32 can be expected. Chow's A-File possesses critical
 33 information regarding Chow's circumstances which are
 34 relevant to his defense.

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Records related to local law enforcement investigations and arrests: There is at least one investigation of Chow that the Government has refused to disclose without citing a basis despite less relevant investigation records being turned over. The matter involves the Government's implication that Chow committed a serious crime but one that he was quickly exonerated of. This will be the subject of an upcoming motion to compel.

Transcripts of summary translations: These were incomplete and brought to the attention of the Government by multiple defendants' attorneys. The Government was made aware approximately two weeks ago and the remaining transcripts have not been turned over. Defense is not aware of the Government's time frame or the volume of records to expect.

Business Documents: CKT and Chow Enterprises, LLC., documentation has been requested and not received. Status is uncertain and will be addressed in a motion to compel. The same goes for financial records.

Pen Registers and Orders: Not produced in their entirety as discussed above.

Search warrant documentation: All search warrant documentation regarding Chow or his associated residences was initially not provided to defense. This was brought to the Government's attention approximately one month ago and was partially remedied approximately two weeks later. However, the only documentation provided was relevant to the application and order but not to inventories as to what was seized, photographs, etc. Those are still outstanding and no time frame has been provided by the Government.

Unindicted Parties: The Government states "...because some of the descriptions of the discovery materials relates to individuals not currently charged or not charged publicly and/or relates to discovery that may only be discoverable to particular defendants but not to other co-defendants . . ." they will submit to an in camera hearing. Although these may or may not be addressing Chow's requests, it should be noted that defense counsel has informally requested on three occasions information related to unindicted parties, communications between specific DOJ employees and unindicted parties, and other information related to the decision not to charge these persons. The Government ignored the first two requests and officially refused to disclose any information as of two weeks ago. A motion to dismiss, and in the

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1 alternative, a motion to compel discovery for selective
2 prosecution will be filed as soon as defense resources
3 permit.

4 In conclusion, Mr. Chow and counsel respect that the
5 Government has an enormous task in facilitating discovery. For
6 the most part the AUSA's, with few exceptions, have appeared to
7 be diligent about their efforts to get complete this task.
8 However, due to the massive nature of this discovery transfer,
9 the failure to organize the discovery in advance, and the
10 potential for a lack of accountability regarding what the FBI
11 turns over, significant scheduling delays are foreseeable.
12 Defendant's Constitutional rights are fundamentally effected by
13 all byproducts of the method in which discovery is handled in
14 this case presently.

15
16
17 /s/ CURTIS L. BRIGGS
18 CURTIS L. BRIGGS
19 Attorney for Defendant
20 KWOK CHEUNG CHOW
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